# THE LAW OF NEWSPAPER LIBEL.

THE liberty of the press has been the boon for which patriots have struggled and many suffered. It has been the watchword of progress, and the shibboleth of party. It has been the battle-cry of those who contended against arrogant pretension and arbitrary power, as it has been the terror of irresponsible rulers. Claimed by its champions as the safeguard of the rights and rewards of freedom, it has been decried by its enemies as destructive of order, and inimical to the public safety. Its attainment has been signalized by determined struggle and effort from the time of the public prosecutions in England over a century ago, until now, when the freedom of the press is recognized and established under the supreme sanction of constitutional guarantees in every one of the United States.

However inestimable the right may have been once regarded, it is certain that at the present time the phrase "the liberty of the press" conveys no such idea of a public blessing as it formerly did. Unfortunately, it now suggests a dangerous and unrestrained license in the vituperation of private character, in the publication of much that is vile and demoralizing, and in the misrepresentation of public men and measures. On all sides we hear complaints of this license and abuse; and the courts are more and more resorted to for redress.* So now it is not so much a question of enlarging the liberty as of circumscribing it; not one of guarding it so much as restraining it. The nature and limit of this liberty have perhaps never been more aptly and elegantly stated than by Wirt, on the impeachment trial of Judge Peck, in December, 1830. The Judge was tried for punishing, as a contempt, a party for the publication of a criticism in refer-

* The "New York Herald" published in 1869 a statement in reference to libel suits against the press; and it appears that there were then pending no less than 756 libel suits of this character, wherein the complainants demand no less than $47,500,000 damages. (See this article, reproduced in Hudson's "History of Journalism," p. 747.)

ence to an opinion he gave in a case. At the close of his argument for the accused, the famous Maryland orator said:

"What is the liberty of the press, and in what does it consist? Does it consist in a right to vilify the tribunals of the country and to bring them into contempt by gross and wanton misrepresentations of their proceedings? Does it consist in a right to obstruct and corrupt the streams of justice by poisoning the public mind with regard to causes in these tribunals before they are heard? Is this a correct idea of the liberty of the press? If so, the defamer has a charter as free as the winds, provided he resort to the press for the propagation of his slander; and, under the prostituted sanction of the liberty of the press, hoary age and virgin innocence lie at his mercy. This is not the idea of the liberty of the press which prevails in courts of justice, or which exists in any sober or well-regulated mind. The liberty of the press is among the greatest of blessings, civil and political, so long as it is directed to its proper object —that of disseminating correct and useful information among the people. But this greatest of blessings may become the greatest of curses if it shall be permitted to burst its proper barriers. The liberty of the press has always been the favorite watchword of those who live by its licentiousness. It has been from time immemorial, is still, and ever will be, the perpetual *decantatum* of all libelers. To be useful, the liberty of the press must be restrained."

The full and unrestrained license accorded the press has resulted too often in the aspersion of private character, and the invasion of domestic privacy; and therefore the tribunals of the country, by means of libel suits, are called upon very frequently to protect and vindicate one of the dearest rights of individuals—reputation. It will be, therefore, instructive, and of practical importance, to inquire what are the limits which the law has placed upon this liberty of the press; and how far it can invade private life and violate reputation without incurring a liability for libel. Let it be premised that it is rather in respect to civil liability that we intend to examine the question; for it is seldom now we witness criminal prosecutions against the press on behalf of the State for an abuse of its liberty. The prosecutions familiar at the present are those by individuals for damages for defamation, or by the State for criminal injury to such individuals. It is not intended to point out what charges or imputations are libelous, or to what extent newspapers can go, in commenting on men and things, without exposing themselves to a charge of libel. To do this we should have to enter into an ex-

amination of the whole law of libel. It will be presumed in this inquiry that there is a knowledge of the law of libel, so far as is necessary to perceive what constitutes a libelous charge; that a libel, as it is well defined, is "any malicious publication, written, printed, or painted, which by words and signs tends to expose a person to contempt, ridicule, hatred, or degradation of character." * The definition given by Chief Justice Parsons, in Commonwealth *vs.* Clap, † has been often quoted with approval. He says, "A libel is a malicious publication expressed either in printing or writing, or by signs or pictures, tending either to blacken the memory of one dead, or the reputation of one who is alive, and expose him to public hatred, contempt, and ridicule."

It is a common understanding that newspapers have a special indulgence or privilege in their public comments, which is denied to private persons. Now this popular fallacy is misleading, not only to those who may rightfully complain against the freedom and immunity allowed the press, but as well to journalists themselves. In a certain sense newspapers are so privileged; for their publications come under the head of "privileged communications," which rebut the presumption of malice, implied when a libel is published without legal excuse. But in this respect newspapers as such enjoy no peculiar immunity; they have merely the same right which any individual has to comment on matters of public concern, or on facts of a public nature, and to criticise public performances. At present, the law takes no judicial cognizance of newspapers; and, independently of certain statutory provisions, the law recognizes no distinction in principle between a publication by the proprietor of a newspaper, and a publication by any other individual.‡ This popular error is stated and combated in a recent case before the Supreme Court of Ohio (Wahle *vs.* Cincinnati Gazette Company), where the defense to a suit for libel was that the publication was privileged, concerning which the Court says: "The question then presented is, whether or not these communications come under the head of privileged communications. Part of the answer states they were made by a public journal of a public officer. The allegations being made by a public journal, of course, makes no difference. If the communications are not privileged when made by a private

* Mercur, J., in Barr *vs.* Moore, Sup. Court of Pennsylvania, November, 1878.

† 4 Mass., 163.

‡ Townshend on Libel, § 252; Foster *vs.* Scripps, 13 "American Law Review," 595; Sheckell *vs.* Jackson, 10 Cushing, 26.

citizen, they would certainly not be privileged if made by a newspaper. It would be a strange rule if we were to hold that a man could with impunity spread abroad a story when he used an engine of fifty-ton power, while he would be punished if he should merely do the same thing by whispering it to an acquaintance. Wherever our laws extend, the rule is the same between private citizens and newspapers. Every person has a right to discuss all matters of public interest, and to comment favorably or unfavorably thereon, either by attack upon, or criticism of, the official acts of persons in a public station. And the freedom of the press is, when rightly understood, commensurate and identical with the freedom of the individual and nothing more. This freedom should at all times be justly guarded and protected, but so should the reputation of an individual against calumny. The right of each is too valuable to be encroached on by the other. The general liberty of the press must be construed, therefore, in subordination to the right of any person calumniated to hold it responsible for an abuse of that liberty."

The consideration we shall give to this subject at present will be principally confined to three points—those which peculiarly concern the sphere of newspaper publication, and in which journalists are most prone to expose themselves to a charge of libel. These are comments relating to public men or measures; criticism on authors, works of art, and literature; and reports of judicial proceedings. But, as preliminary to this inquiry, it will be useful to discuss some special points having a particular reference to newspapers, and relating to what may be termed *newspaper law.*

Journals are well known to be the vehicle or means of circulating reports on common or hearsay rumor, and sometimes on very unreliable authority. They quote from, and often refer impersonally to vague reports and rumors under a mistaken idea that in this manner they may evade a libelous charge. Yet it is well established that it is no less libelous to make a charge on common report, or on the authority of another named, than to make it directly. But, although a libel is not *justifiable* when the article is copied from another paper, a defendent may, however, show in mitigation of damages that it had previously been published in other papers, for this serves to show the *quo animo.** In the case of Storey *vs.* Earley, in the Supreme Court of Illinois, February,

* Hewitt *vs.* Pioneer Press Company, 23 Minn., 178; Heilman *vs.* Shanklin, 60 Indiana, 424.

1878, Breese, J., says that "there is a clear distinction between a publication of slanderous matter in a newspaper as a matter of news, and the publication of slanderous matter on the personal truthfulness and responsibility of the defendant."

An editor is responsible for a libelous communication published, although the writer's name is signed.* And the fact that a libel was published in the communication of a correspondent, was held not admissible in evidence to mitigate damages.†

On this subject, in one of our early cases in Pennsylvania,‡ the Court tersely says: "It will not be denied that if one designedly bespatters another's clothes with filth as he passes the street, though at the instigation of a third person, he would be liable for damages. And shall a printer with his types blacken the fairest reputation—the choicest jewel we enjoy—and go scot-free, merely because he has told the world that the paper is inserted at the request of another?"

This point was recently well considered in Perret *vs.* New Orleans Times.§ Certain irresponsible persons, whose residence was unknown, published in the defendant's journal an advertisement severely reflecting on certain public men. The publication was admitted, but the defense was that it was published as an advertisement; and that it was received at a late hour of the night, and during the absence and without the knowledge of the proprietors of the paper. It was denied that the defendant had any malicious intent; and, as proving an absence of malice, it was shown that as soon as the plaintiff brought the injury to the attention of the defendant, an editorial article was inserted, explanatory of the publication, which the plaintiff deemed satisfactory. The defendant was, however, held liable. The decision of the Court in this case deserves particular attention, as enunciating some sound and salutary principles in regard to newspaper defamation. The Court admitted the right of public journals to freely comment upon the acts and conduct of men in public life, to speak faithfully and boldly in the interests of the people regarding public measures, and questions of all kinds that concern the community at large. The Court then says: "Still there is a limit beyond which this freedom becomes license. The law which shields the private character and

* Hotchkiss *vs.* Oliphant, 2 Hill, 510.

† Talbutt *vs.* Clark, 2 Moody and Rob., 312.

‡ Runkle *vs.* Meyer, 3 Yeates, 518.

§ 25 La. An., 170.

reputation of an inoffensive person from the assaults of calumny and falsehood is founded upon a public sentiment of greater power even than that of the free press. It forbids the wanton violation of the sacredness of personal character and good name."

Sometimes after an injury has been done, a paper may, by way of reparation, offer and make an explanation or retraction of a libelous charge; but, while this is commendable and entitled to consideration as a mitigation of the damage, it will not shield nor exempt a publisher from an action.* The publication of the explanation or retraction may be offered in evidence in mitigation, just as a subsequent publication may be given in evidence to show a reiteration of the charge, and the malice of a publisher.† But neither the good intentions of the publisher nor his honest belief in the truth of the charge when it is libelous will be a justification, though they may show in mitigation, for in these cases the *intent* is a main element in the liability.‡

When an editor desires to make the *amende honorable*, he should do so promptly in a prominent part of his paper and in clear type. It will not be sufficient to put the apology among "notices to correspondents," and in fine type.§

An action lies against the proprietor of a newspaper edited by another, although the publication was made without the knowledge of such proprietor. By intrusting the conduct of the paper to another, the owner constitutes this person his general agent, and is therefore responsible for his acts in such capacity.‖ In an early case in New York, this point came under the consideration of the Court, and it was determined that the proprietor of a newspaper, which is edited by another, is responsible for a libel published therein, although published without his knowledge.¶ The same rule was held in a well-known English case, Rex *vs.* Walter,** which was

* See a late instructive case in this connection: Cass *vs.* New Orleans Times, 27 La. An., 214, and Townshend on Libel, § 413.

† Goodrich *vs.* Stone, 11 Metcalf, 486; Barr *vs.* Moore, Sup. Court of Pennsylvania, November, 1878; Thomas *vs.* Croswell, 7 Johnson's Reports, 264.

‡ Rearick *vs.* Wilcox, 81 Ill., 77.

§ Lafone *vs.* Smith, 3 Hurl. and N., 735.

‖ Detroit Daily Post Co. *vs.* McArthur, 16 Michigan, 447. This case is instructive as showing that a proprietor may be to some extent relieved from liability when he has taken due precaution to select careful and competent persons to conduct the paper.

¶ Andres *vs.* Wells, 7 Johnson's Reports, 260, decided in 1810.

** 3 Esp. 21.

an indictment for libel against the proprietor of the "Times." He proved that he lived in the country, and took no part in conducting the newspaper, which was under the charge of his son. In spite of the able advocacy of Erskine, Lord Kenyon was clearly of opinion that the proprietor of a newspaper was answerable, criminally as well as civilly, for the acts of his servants or agents in conducting such newspaper.

Irony, humor, and satire are frequently indulged in to make a journal "spicy"; and as a general rule a writer may safely shield himself in this manner if his shafts are not too directly leveled, or his allusions too personal or pungent. The editor of the Denver "Tribune" published, concerning Mr. Downing, the following:

> "My conscience (meaning the conscience of the said plaintiff)
> hath a thousand several tongues,
> And every tongue brings in a several tale;
> And every tale condemns me (meaning the said plaintiff)
> for a villain.
> Perjury, foul perjury in the highest degree;
> Murder, stern murder in the direst degree,
> All several sins, all used in each degree,
> Throng to the bar, crying all: 'Guilty! guilty!'
>
> *Richard III.*

—and yet Jack Downing (meaning the said plaintiff) affects to laugh with a low, guttural sound, thus: Ha! ha!! ha!!!" The complaint charged that this imputed perjury as well as murder. The article also charged that the plaintiff was a "second Boss Tweed" and a ballot-box stuffer. It was left to the jury to find what the defendant meant to charge, or whether he meant anything serious, and the jury being doubtful as to what precise charge was meant, gave the defendant "the benefit of the doubt," and the editor had a verdict in his favor.* But irony is not always to be indulged in with impunity. Thus, where the plaintiff having published a somewhat singular article in his paper, the defendant, the editor of another paper, published an ironical article, alleging that the plaintiff had become insane; that his friends had put him in confinement, and consigned the management of his paper to an Irishman; that he had been put in a strait-jacket, etc. This was held libelous, and it was left to the jury to determine how far it was malevolent.† So humor can not always be safely indulged

* Downing *vs.* Brown, 3 Colorado, 571.

† Southwick *vs.* Stevens, 10 Johnson's Reports, 443.

in; it may sometimes be a dangerous instrument, even in an editor's hands. The editor will be excused, however, if he can show to the jury that he thought a communication complained of was a fictitious narrative or a mere fancy sketch, and that it was not intended for anybody in particular, atthough the writer intended it as a libel on the plaintiff. In such a case the writer only is liable to the party libeled.*

We will now consider more specially the three divisions of the subject we proposed:

*1. Comments respecting Public Men.*

It is in this field that journals are most liable to abuse their privileges, and to expose themselves to the hazard of a prosecution for libel. The acknowledged privilege which they possess, in common with citizens generally, of commenting upon public affairs, criticising the actors in such affairs, exposing their shortcomings or disqualifications, has given them a license in this respect which induces them too often to assail personal reputation, and to invade domestic privacy. It is in this direction we so frequently hear complaints of the abuses of the press. Good men are said to be deterred from entering public life, or participating in public affairs, because they will be thus subjected to calumny, and exposed in their private life to adverse criticism. It must be confessed, the abuse is too frequent and the evil lamentable; but it is well to know that, under the law as laid down by our courts, the fact of a person being a public character, or a candidate for a public office, does not necessarily subject him to be calumniated, or held up to ridicule in his private life, without redress. Our courts have lately, in several instances, laid down salutary principles for the protection of the private character of those engaged in public affairs. There is an erroneous idea abroad that a man can be calumniated in his private character, falsely ridiculed and traduced, because he happens to be a public character. There is, however, a license allowed in this respect, and a right given to criticise, which in reference to a private individual would be clearly libelous, because it is acknowledged that a service is rendered thereby to the people at large, who have a right to be informed concerning the merits and qualifications of those who seek their suffrages. It is laid down in Parmiter *vs.* Coupland,† that a much greater latitude will be extended to criti-

* Smith *vs.* Ashley, 11 Metcalf, 367.

† 6 M. and W., 108.

cisms on persons occupying a public capacity, than to criticisms on private individuals; and publications which would be clearly libelous if leveled against the latter, may be innocent and even commendable when directed against the former.

At the beginning of this century Chief Justice Parsons very accurately stated the ground and the limit of this privilege in Commonwealth *vs.* Clap.* "When any man," he says, "shall consent to be a candidate for a public office conferred by the election of the people, he must be considered as putting his character in issue, so far as it may respect his fitness and qualifications for the office. And publications of the truth on this subject, with the honest intention of informing the people, are not a libel. For it would be unreasonable to conclude that the publication of truths, which it is the interest of the public to know, should be an offense against their laws. . . . For the same reason the publication of falsehood and calumny against public officers is an offense most dangerous to the people and deserves punishment; because the people may be deceived, and reject the best citizens to their great injury, and, it may be, to the loss of their liberties." How well it would be if courts would particularly impress juries with the principle here laid down, in regard to liability for calumniating public characters! The correct doctrine on this subject may be thus stated: The writer must not make the occasion one for the gratification of personal malice and vindictiveness, when commenting on public affairs. He must not make imputations of base, sordid, or corrupt motives, or dishonest conduct. He is not bound to justify to the very letter everything that he writes; yet his inferences must not be reckless and unjust, though they may be hostile and severe. If he proceeds further, and in a spirit of reckless and inconsiderate imputation makes false charges, though he may in good faith believe in the truth of his imputations, he is guilty of a libel.†

The virulence of political and party strife at the beginning of this century was conspicuous in the historical prosecution for libel in People *vs.* Croswell‡ in New York. Hildreth thus accurately describes this celebrated action: "While these political intrigues were in progress, a case came on for argument before the Supreme Court of New York, then sitting at Albany, in which the rights and freedom of the press were deeply involved. Ambrose Spencer,

* 4 Mass., 163.

† Shortt on Libel, 434; Cockburn, J., in Hedley *vs.* Barlow, 4 F. and F., 230.

‡ 3 Johnson's Cases, 360.

as Attorney-General, had instituted a prosecution for libel against a Federal printer for having asserted that Jefferson had paid Callender for traducing Washington and Adams. The case had been tried before Chief Justice Lewis, who had held, among other things, that in a criminal trial for libel, the truth could not be given in evidence; and that the jury were merely to decide the fact of publication, the question belonging exclusively to the court whether it were a libel or not. These points coming on for a rehearing before the Supreme Court, on a motion for a new trial, Spencer maintained with great zeal the arbitrary doctrines laid down by Lewis. Hamilton, a volunteer in behalf of the liberty of the press, displayed on the other side even more than his wonted eloquence and energy in denouncing the maxim 'The greater the truth the greater the libel,' at least in its relation to political publications. The court, after a long deliberation, was equally divided—Kent and Thompson against Lewis and Livingston. The opinion of the Chief Justice stood as law; but Hamilton's eloquence was not lost. A declaratory bill was introduced in the Assembly, then sitting, by a Federal member. The Republicans shrank from this implied censure on their candidate for Governor, and the matter was postponed to the next session. An act allowing the truth to be given in evidence was then passed, but was defeated by the council of revision, composed of the judges and Chancellor. The act, however, with some modifications, became law the next year, and such either by constitutional provisions, legislative enactment, or the decisions of the courts, is now the law throughout the United States."

A late decision in Kansas shows that, under the Constitution and statutes of that State, the truth will not be a justification in criminal as in civil actions, unless published for "justifiable ends."* It was lately held otherwise (as the cases generally hold) in Massachusetts.† We can not but more readily subscribe to the good policy of the Kansas rule, although at the time the decision was rendered, it gave rise to much controversy in that State and in other places. Allowing the truth to be given in evidence as a justification, irrespective of the object of the publication, gives the press and libelous writers generally an immunity which may be destructive to the peace of the community, and inimical to the protection of private character. Members of legislative bodies too often have to bear the effect of journalistic rancor, and have to suffer their motives to be impugned and misrepresented. Calling

* Castle *vs.* Houston, 17 Kan., 417. † Perry *vs.* Potter, 124 Mass., 338.

a member of Congress a "fawning sycophant," "a misrepresentive," and charging that he had "abandoned his post in Congress" to seek a certain office, was held libelous.*

In a case where a lawyer offered himself as a political candidate the proprietor of the "Sunday Mercury" published concerning him: "Elnathan L. Sanderson, extra-radical candidate for Assembly from the third, fourth, and eleventh wards of Brooklyn, did a good thing in his sober moments in the way of collecting soldiers' claims against the Government for a fearful percentage. The blood-money he has got from the 'boys in blue' in this way is supposed to be a big thing, and may elect him to the Assembly on the 'loyal ticket,' although the soldiers and sailors are out in full force against him." The Court held that the fact that the plaintiff was a candidate for office did not make the publication privileged.

Recent decisions in Pennsylvania, Michigan, and Illinois, show the direction which the courts are taking, and are instructive, because they limit in an important degree this assumed privilege of animadverting upon and aspersing the character of men occupying a public or *quasi* public station.

The case of Foster *vs.* Scripps † was lately decided in Michigan. This was an action for libel brought against the proprietor of the Detroit "Evening News," for publishing of the plaintiff, who was a city physician, that he had caused the death of a child by introducing scarlet fever into its system in vaccinating it. In the court below the article was held to be privileged, on the ground that the plaintiff was a city physician. The Supreme Court reversed the judgment, and Chief Justice Campbell, in giving the opinion of the Apellate Court, very ably considers the question of privileged publications. "It is not," he says, "and can not be, claimed that there is any privilege in journalism which would excuse a newspaper, when any other publication of libels would not be excused. Whatever functions the journalist performs are assumed and laid down at his will, and performed under the same responsibility attaching to all other persons. The greater extent of circulation makes his libels more damaging, and imposes special duties as to care to prevent the risk of such mischief proportioned to the peril. But, whatever may be the measure of damages, there is no difference in liability to suit. Allowing the most liberal rule as to the liability of persons in public employment to criticism for their conduct,

* Thomas *vs.* Croswell, 7 Johnson's Reports, 264.

† 13 "Am. Law Rev.," 595.

in which the public are interested, there certainly has never been any rule which subjected persons, public or private, to be falsely traduced. The nearest approach to such license is where the person vilified presents himself before the body of the public as a candidate for an elective office, or addresses the public in open public meetings for public purposes. But even in such cases we shall not find support for any doctrine which will subject him, without remedy, to every species of malevolent attack. But where a person occupies an office like that of a city or district physician, not elected by the public, but appointed by the council, we have found no authority, and we think there is no reason, for holding any libel privileged, except a *bona fide* representation, made without malice to the proper authority, complaining on reasonable grounds."

The case of Rearick *vs.* Wilcox, in Illinois,* considers the same subject. Here it is decided that it is no justification nor mitigation of a libel upon a candidate if there was great public excitement in the election, in which party spirit ran high, and an instruction to the jury that they might consider such excitement was held erroneous. Neither the good intentions, nor the reports which reached an editor, could justify, though, to a certain extent, they might excuse him. These decisions are noticeable, for they show the principles controlling courts in laying down the law to juries. If they were followed, there would be less distrust in the courts and in legal remedies for the vindication of private character from wanton and reckless attacks.

We are accustomed to regard the French newspaper law as severe and illiberal; but, with all the laudation of our law, we must claim that the French law manifests a more tender solicitude for the inviolability of private character, and a higher regard for the intimacy of domestic life, than our own. While a public journal in France may freely comment on a person in his public or official character, it is forbidden to pass over the threshold of the family, and reveal to public view the acts of private life. The acts taking place in the privacy of the family are not to be exposed, and must be sacred from the prying and curious eyes of the ubiquitous reporter. We could hardly expect outside of Anglo-Saxon communities such a high regard for the inviolability and the sanctity of the family. Yet to-day in France, under the law of the 11th of May, 1868, any publication in a periodical relating to facts of private life is prohibited under a fine of five hundred francs. A recent

* 81 Ill., 77.

decision under this law shows how strictly the courts follow it. Thus, it was held to be violated when a paper published the names, and gave sketches of certain persons who entered upon a pilgrimage, although the court admitted it might be allowable to publish the fact of the pilgrimage, and its organization.* The construction of the law appears further from a decision of the court published in the "Journal du Palais" for June, 1877, where it is held: "*Les faits de la vie privée dont la publication dans écrit périodique tombe sous le coup d'art.* 11 *de la loi du* 11 *mai*, 1868, *s'entendent non seulement des faits qui se passent dans la famille, mais encore de ceux qui s'accomplissement dans le monde exterieur, même dans un lieu public et avec une publicité relative lorsque l'auteur de ces faits les exécute comme homme privé.*" The law in France makes an important distinction in the mode of trying offenses of the press against private character, and offenses against men in their public or official character. In the former case there is a more summary mode, without a jury, before the "Tribunaux Correctionnels," while offenses against public men are to be tried by a jury since the law of the 15th of April, 1871. Art. III of this law provides:

"*En cas d'imputation contre les dépositaires ou agents de l'autorité publique, à l'occasion de faits relatifs à leurs fonctions, ou contre personne ayant agi dans un caractère public, a l'occasion de ces actes, la preuve de la verité des faits diffamatoires pourra être faite devant le jury.*"

The Duc de Broglie was chairman of the committee who drew up the *projet* of this law, and he made a very instructive report, showing the views that influenced the committee in relegating to the jury offenses of this character. He says: "Si l'imputation est fondée au contraire, si c'est un fait vrai qui est révélé au public, un service éminent est rendu à société, qui se trouve par là avertie du danger que lui fait courir un serviteur infidèle. Attaquer les fonctionnaires publics est le droit d'un citoyen dans un pays libre, et l'abus ne commence que quand l'attaque est poussée jusqu'à dénaturer la verité. Si jamais la verité est nécessaire, c'est pour discerner la limite qui sépare un acte non seulement licite, mais louable, d'un acte criminel."

We think the policy of these laws is to be commended; and it would be well if we had some similar legislation in favor of the inviolability of private life. If I am the owner of a field, I can, by virtue of that ownership, restrain the invasion of my property by

* "Journal du Palais" for 1874, p. 563.

simply warning off all trespassers. I have a right to an exclusive and unmolested enjoyment of this property. And is not one's private character as sacred and inviolable as his house or property? If the law seeks to enter the privacy of the home, it has to issue its regular process and mandate before it can be properly done. And why can a public writer at his will pass the threshold of that home, drag to public view its intimacies, its privacy, and its confidences, simply because a person in some manner happens to attract public attention?

*2. Criticism.*

Writers in the public press frequently make themselves liable to a charge of libel by reason of an intemperate and reckless criticism of works of literature and art. They are permitted a wide latitude in this respect, on the ground that it is praiseworthy to enlighten the public in reference to such works, and improve the public taste. They can go far in condemning the productions as vicious, crude, and demoralizing; but they can not attribute unworthy and base motives, and bad faith, to the authors. Says Lord Ellenborough, in Carr *vs.* Hood*: "Every man who publishes a book commits himself to the judgment of the public, and any one may comment on his performance. If the commentator does not step aside from his work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right. . . . The critic does a great service to the public, who writes down any vapid and useless publication, such as ought never to have appeared. He checks the dissemination of bad taste, and prevents people from wasting both their time and money upon trash. I speak of fair and candid criticism, and this every one has a right to publish, although the author may suffer a loss from it. . . . Reflection on personal character is another thing. Show me an attack on the moral character of the plaintiff, or any attack upon his character unconnected with his authorship, and I shall be as ready as any judge who ever sat here to protect him; but I can not hear of malice on account of turning his words into ridicule." Similar views were laid down in Strauss *vs.* Francis,† in reference to a critique in the "Athenæum," where a novel was described as "characterized by vulgarity, profanity, and indelicacy, bad French, bad German, and bad English, and abuse of persons living and dead."

The limits of criticism appear from the action brought by the

* 1 Campbell, 358.

† 4 F. and F., 1113.

celebrated novelist Cooper against Stone,* for a libel published in the "Commercial Advertiser." Here it was held that, while it is allowable freely to condemn and criticise an author's productions, a critic can not impute to the author false and dishonest or unworthy motives in the preparation of his book.

One of the most famous cases of this kind was an action for libel brought by Charles Reade against the editor of "The Round Table," in 1870, for a criticism on his "Griffith Gaunt." This case is reported as Reade *vs.* Sweetzer, † and the Judge's charge to the jury has been much approved as containing a correct statement of the privileges and limits of criticism. The article in "The Round Table" charged that it was "one of the worst stories that had been printed since Sterne, Fielding, and Smollett defiled the literature of the already foul eighteenth century," and that it was "not only tainted with this one foul spot, it is replete with impurity, it reeks with allusions that the most prurient scandal-monger would hesitate to make." It was denounced as unfit for circulation in families, and it was said to be doubtful whether the author had not lent his name to others to utter this work.

Judge Clerke charged the jury: "The critic may say what he pleases of the literary merits of the published production of an author, but with respect to his personal rights, relating to his reputation, the critic has no more privilege than any other person not assuming the business of criticism. For instance, he may say that the matter is crude, forced, and unnatural; that it betrays poverty of thought, and abounds with commonplaces and platitudes, being altogether flat, stale, and unprofitable, and that its style is affected, obscure, and involved. He may say, as Burke said of the style of Gibbon, that it is execrable, or that it is personally affected, absurd, or wayward. . . . The critic can call a painting a daub and an abortion, but he can not call the painter himself a low, discreditable pretender and an abortion." He further charged that a critic may not, from the sentiments and characters of the work, impute unworthy motives and evil designs to the author himself. The jury merely found for the plaintiff six cents damages, though the charge was so much in his favor.

A recent case in Massachusetts, ‡ in reference to a criticism concerning the famous "Cardiff Giant" also illustrates the limits of criticism. The article stated that the "giant" originally cost eight

* 24 Wend., 442. † 6 Abb., N. S. 9.

‡ Gott *vs.* Pulsifer, 122 Mass., 235.

dollars, and that "the man who brought the colossal monolith to light confessed that it was a fraud." The defendant testified that he wrote the article as a humorous comment on one in the Chicago "Tribune"; that he did not know the plaintiff, and intended no malice. Evidence on the plaintiff's part of the value of the "giant" as a scientific curiosity was ruled out. The plaintiff requested forty-one instructions to be given to the jury; but a verdict was given for the defendant. The Court on appeal held the ninth request to have been erroneously declined, and granted the promoter of the "giant" another trial, the ground being that under that direction the jury may have found that the defendant's charges were false, but that he was not liable to punishment because he intended no injury. This, the Court says, is not law; for a publisher is liable, if his comments exceed the bounds of fair criticism and produce injury, no matter what were his motives.

*3. Reports of Judicial Proceedings.*

Reports by newspapers of judicial proceedings, when they are true, impartial, and not garbled, are privileged. The report is not privileged if it in any wise discolors or garbles the proceedings or adds unwarrantable comments or insinuations. The English courts have gone further in restricting this privilege than our own when the proceedings are defamatory or indecent. Maule, J., in Hoare *vs.* Silverlock, § says, "Matters may appear in a court of justice that may have so immoral a tendency, or be so injurious to the character of an individual, that their publication would not be tolerated." But this statement has reference particularly to the case of individuals *voluntarily* publishing the proceedings of a trial, in order to reflect on the character of a person by some defamatory matter; but it is different in the case of newspapers, which assume the *duty*, for public information, of reporting the proceedings. They are then fully privileged, if they give a true and fair account of the proceedings, notwithstanding matter defamatory of an individual is thereby published.

In New York, the publication in newspapers of judicial and other public proceedings is protected by statute, which enacts: "No reporter, editor, or proprietor of any newspaper shall be liable to any action or prosecution, civil or criminal, for a fair and true report in such newspaper of any judicial, legislative, or other public official proceedings, or any statement, speech, argument, or debate

in the course of the same, except upon actual proof of malice, which shall in no case be implied from the fact of publication. Nothing in the preceding section contained shall be so construed as to protect any such reporter, editor, or proprietor from an action or indictment for any libelous comments or remarks superadded to and interspersed or connected with such report." *

When it is said that the account or report of a trial must be fair and impartial, it is understood that a party must publish not merely fragments, but the whole case; not necessarily *in extenso*, for it may be abridged. He can not partially state it so as to draw unwarrantable inferences or unjust conclusions. He may comment on the proceedings, provided the comments are fair and impartial.†

Says Spencer, J., in Thomas *vs.* Croswell,‡ "There is not a *dictum* to be met with in the books, that a man, under the pretense of publishing the proceedings of a court of justice, may discolor and garble the proceedings by his own comments and constructions, so as to effect the purpose of aspersing the characters of those concerned."

The case of Pittock *vs.* O'Neil § is a good illustration, showing how dangerous it is to intersperse or accompany the account of an action with sensational and highly colored conclusions and comments of the writer. Such expressions in relation to a divorce case as "terrible story of domestic treachery and guilt," "wreck of domestic happiness," "shameless treachery and hypocrisy," "scandalous affair," etc., were held libelous; and the plaintiff had a verdict of one thousand dollars. Comments may be made on a body of men in such a reckless manner, and corrupt motives attributed to them collectively, so as to give to an individual of that body a right of action on his own account. This was the case where a newspaper article pronounced the verdict of a jury "infamous"; and added, "We can not express the contempt which should be felt for those twelve men, who have thus not only offended public opinion, but have done injustice to their own oaths." It was held that an action for libel might be maintained by a member of the jury against the publisher.‖

This is an important decision, and deserves attention from news-

* Laws of 1854, Ch. 130, §§ 1, 2. And see Ackerman *vs.* Jones, 37 N. Y. Superior Court, 42.

† Lewis *vs.* Walter, 4 B. and Ald., 612; Stiles *vs.* Nokes, 7 East, 493.

‡ 7 Johnson's Reports, 264. § 63 Pennsylvania Reports, 253.

‖ Byers *vs.* Martin, 2 Colorado, 605.

papers when they comment on the verdicts of juries which they disapprove, as it leaves them open to twelve suits for libel for the same charge.

A libel may be conveyed in the head-lines of a report. Thus, where an article charged, in the heading of the report of public proceedings, that a public officer had been guilty of blackmailing, and had been dismissed from office on that account, it was held to be libelous, unless it was a fair deduction from the facts reported.* And so where a report of proceedings in a court of law was headed, "Shameless conduct of an attorney." †

Whether newspaper writers can go to the court records and extract therefrom accounts of actions begun before any hearing has been had on the complaint, as to publish, in a suit for divorce, the substance of a bill charging a person with adultery, was a question in a recent Michigan case.‡ The Court, although it did not decide the point, entertained a "strong impression" that such publication was not privileged. The same question arose, and was decided in Barber *vs.* St. Louis Dispatch Co., in 1876; § and it was held that such publication was not privileged, as it was an account of an *ex parte* proceeding. The rule in England was, and until lately in this country, that the *ex parte* proceedings before coroners and committing magistrates were not privileged, and newspapers published them at their peril. But in a late English case ‖ the rule was overthrown by Lord Cockburn, when he held that the report of an *ex parte* application made to a police magistrate was privileged, notwithstanding the magistrate decided he had no jurisdiction. A similar decision was made in Maryland in the case of McBee *vs.* Fulton, ¶ an action against the proprietor of the "Baltimore American," and it was held that newspaper and other reports of courts of justice are privileged; and this extends to preliminary examinations before justices of the peace. The reports, however, though they need not be *verbatim*, must be substantially correct, and not garbled or partial, and made *bona fide* and without malice. These decisions may be accepted as laying down the generally received doctrine on this point.

The uncertainty of the result in an action against the proprietor of a newspaper for libel, deters many from attempting to pursue this method in the vindication of their character. This uncertainty

* Edsall *vs.* Brooks, 17 Abb. Pr., 221.
† Walcott *vs.* Hall, 6 Mass., 514.
‡ Scripps *vs.* Reilly, 35 Michigan, 371.
§ See 4 "Central Law Journal," 332.
‖ Usill *vs.* Hales, 26 W. R., 371.
¶ 47 Md., 403.

and distrust, it must be admitted, do not arise from any indefiniteness or uncertainty in the law. Enough has been said to show the principles by which courts are guided in expounding the law to juries; but, unfortunately, jurors bring more of their prejudices, feelings, and prepossessions to the determination of actions of this nature than to other causes; and the result is a growing distrust in legal proceedings as a vindication of injured reputation. There have of late been many remedies suggested for this miscarriage of justice; but some are too radical, and are, besides, not consonant to our system. We suggest, however, that a partial remedy for this defect might be given if the determination of such actions were given to a select jury—to what is known as a "special jury," which is now granted in certain cases requiring peculiar knowledge, and where intricate and important questions are involved.*

Very frequently, in actions for libel, the question in a great measure may depend upon a turn or trick of expression, a phrase of peculiar signification, or some obscure or classical allusion, which our ordinary jurors can hardly be expected to comprehend. Therefore, in prosecutions for libel, especially against the press, a party ought to have a *positive* right to demand a special or struck jury, composed of a class of men of a higher order of intelligence than those ordinarily called to serve upon juries. It should not depend, as now in many States, on judicial discretion; it should be a statutory right. The courts have on some occasions granted the right to such a jury, as where the libel was against a public officer in his official character.† In addition to this right, let such actions have a precedence on the calendar, so that an injured party may have speedy redress before the injury becomes irreparable, and the charge works its blasting effect. At present, under the long delay and continuances, a party may be irretrievably injured while waiting for the slow proceeding of a court to give him reparation; and thus a greater inducement is given to breaches of the peace, by compelling an injured party to take into his own hands the vindication of the wrong done him.

JOHN PROFFATT.

* 3 Blackstone, 357; and see Proffatt on "Jury Trial," § 71.

† Thomas *vs.* Croswell, 4 Johnson's Rep., 491.